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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1982.

In Re Air Crash Disaster Near Chicago, Illinois On May 25, 1979

Syed Haider, as Administrator of the Estate of Victoria Chen Haider, Deceased,

Petitioner,

vs.

McDonnell Douglas Corporation, a corporation; and American Airlines, Inc., a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Does a federal court, in a wrongful death suit pending in that court by reason only of diversity of citizenship, have the right to apply federal law, enunciated by the United States Supreme Court in a suit brought pursuant to the Federal Employers' Liability Act, to the effect that evidence of taxes upon a decedent's earnings should be admitted at trial and that an instruction should be given to the jury that its award will be exempt from taxation, when such evidence and instruction would not be permitted if the same case was tried in the Illinois state court?

II. Is the federal court entitled to interpret the Federal Rules of Evidence so as to allow evidence of income taxes in a wrongful death case, brought under a state statute, on the basis of "relevancy"—when such evidence would be precluded if the same case was tried in the state court?

III. Is the federal court entitled to give an instruction admonishing the jury that its verdict is free from income taxes on the basis that this is a "procedural" issue, when the same instruction would not be given if the same case was tried in the state court?

IV. Is the admissibility of income taxes in regard to a wrongfully killed person's earnings, in fact, "outcome determinative," so that the federal court must follow applicable state law, which precludes such evidence,

whether the federal court agrees with the state court ruling or not?

V. Is the giving of an instruction admonishing the jury that its verdict is free from income taxes, in fact, "outcome determinative," so that the federal court must follow applicable state law, which precludes such an instruction, whether the federal court agrees with the state court ruling or not?

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Petitioner, Syed Haider, as Administrator of the Estate of Victoria Chen Haider, Deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

An interlocutory appeal to the Seventh Circuit was taken from the ruling of the United States District Court

for the Northern District of Illinois, in regard to a Motion in Limine filed by Haider, in a suit seeking damages under the Wrongful Death Statute of Illinois (Ill. Rev. Stat. (1979) ch. 70, §1, 2) for the death of his wife.

The District Court ruled that Illinois law was binding upon the federal court as to the propriety of evidence of income taxes upon the earnings of the decedent, and as to the propriety of a jury instruction that any award is free from income taxes; that Illinois law precludes such evidence and instruction; that the holdings in *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980), a wrongful death action brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, are inapplicable to a wrongful death suit which is in the federal court solely by reason of diversity of citizenship, when the suit is brought pursuant to a state statute and not pursuant to a federal statute.

OPINION BELOW

The opinion of the United States Court of Appeals is reported at 701 F.2d 1189 (1983). [The opinion of the United States District Court is reported at *In re Air Crash Disaster*, 526 F.Supp. 226 (N.D.Ill. 1981)].

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered February 15, 1983, rehearing was denied on March 31, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Plaintiff, Syed Haider, is an Illinois citizen. He was married to Victoria Chen Haider. She was killed in the crash of a DC-10 jetliner at O'Hare Airport, Chicago,

on May 25, 1979. A child, Sean, was born of this marriage on May 18, 1978. Suit was brought under the Illinois Wrongful Death Statute (Ill. Rev. Stat. (1979) ch. 70, §1, 2).

Because of the vagaries of diversity of citizenship (although there was a dispute in this case as to the principal place of business of American Airlines on the date of the occurrence), this suit is in the federal court.

After this Court's decision in *Norfolk & Western Railway* v. *Liepelt,* 444 U.S. 490, 100 S. Ct. 755, 62 L.Ed. 2d 698 (1980), plaintiff filed a Motion in Limine and Memorandum in Support of such motion, requesting an order:

> 1. To exclude any evidence pertaining to state or federal income taxes upon the earnings of the decedent, Victoria Chen Haider. Plaintiff moved the Court to instruct counsel for defendants, McDonnell Douglas Corporation and American Airlines, Inc., not to ask any question, or make any references or inferences, regarding income taxes upon any of the past or future earnings of Victoria Chen Haider, Deceased.
>
> 2. For a pretrial ruling that the jury would not be instructed to the effect that estimated income taxes upon past or future estimated earnings of Victoria Chen Haider, Deceased, should be considered by them in arriving at their verdict as to compensatory damages.
>
> 3. To make a pretrial ruling that this Court would not instruct the jury that any verdict or judgment in this case for compensatory damages would not be subject to the payment of income taxes.

McDonnell Douglas Corporation filed separate motions in 32 actions for a pretrial ruling that the evidence of

taxation would be admissible at trial, and that the jury should be instructed as follows:

> If you decide to award any damages to the plaintiff, your award will be exempt from any income taxes; therefore, in fixing the amount of your award, you should not be concerned about or consider the effect of taxes on the award.

On November 17, 1981, the District Court filed its memorandum (opinion) and entered its order, providing:

> Plaintiff's motion in limine opposing the admission into evidence of the effect of income taxation upon the decedent's earnings and opposing the giving of jury instructions as to the same matter is granted. Defendants' counter-motion in limine is denied. The parties' motion for certification under 28 U.S.C. §1292(b) will be granted with a recommendation for expedited consideration.

The plaintiff, Haider, agreed to requests of American Airlines and McDonnell Douglas Corporation for certification.

Plaintiff recognized, as did the defendants and the District Court, that rulings as to the admissibility of evidence of income taxes and the giving or not giving of a jury instruction as to the non-taxability of verdicts should be obtained prior to trial, in order to avoid the possibility of multiple retrials of the many pending federal court cases arising out of the same occurrence.

The Court of Appeals, by accepting the interlocutory appeal, acknowledged the significance of these issues.

The *Haider* case and a substantial number of other cases arising out of the O'Hare air crash remain pending in various federal courts of this country, but primarily in Illinois.

REASONS FOR GRANTING THE WRIT

A total of 273 persons were killed in this crash. Others were injured. A considerable number of wrongful death cases were filed in state courts. Those plaintiffs were able to prevent removal of their suits to the United States District Court by joining component part makers who were residents of the state in which suits were filed. A larger number of cases are in federal court. Such suits are there *solely* by reason of diversity of citizenship; no federal statute is involved in any suit in federal court. The federal court suits were consolidated for discovery and pretrial purposes before United States District Court Judges Edwin A. Robson and Hubert L. Will in Chicago in accordance with an order of the Multidistrict Litigation Act Panel of judges.

The federal courthouse for the Northern District of Illinois, Eastern Division and the state courthouse are only approximately 600 yards apart.

Despite the small geographical distance between the federal and state courthouses, the rulings of the United States Court of Appeals will result in grossly discriminatory and prejudicial treatment of the federal court plaintiffs as compared to the state court plaintiffs.

The cases filed in the *state courts have been* tried without:

(a) Any evidence of the effect of income taxes upon earnings;

(b) Any instructions admonishing any jury to the effect that its verdict was not subject to income taxes.

An affidavit was filed in the United States Court of Appeals for the Seventh Circuit by a trial attorney for five plaintiffs, who was able to keep his clients' cases in the state court of California. This affidavit was as follows:

> I, BRUCE WALKUP, being duly sworn, do depose and say that:
>
> I tried the following cases before Judge Rafael H. Galceran in the Superior Court, County of Los Angeles:
>
> Pohlson vs. McDonnell Douglas
> Fowler vs. McDonnell Douglas
> Cady vs. McDonnell Douglas
> Keely vs. McDonnell Douglas
> Donahue vs. McDonnell Douglas
>
> Evidence was not admitted as to income taxes paid by the decedents, no evidence concerning income taxes was admitted into evidence, and no instruction on income taxes was given by the Court.
>
> Dated this 3rd day of March, 1982 at San Francisco, Ca.
>
> /s/ Bruce Walkup
> Bruce Walkup
>
> Subscribed and sworn to before
> me this 3rd day of March, 1982.
> /s/ Margarit E. Iriland
> Notary Public

No amount of semantics can disguise the reality that plaintiffs whose cases end up in the federal court, due merely to the happenstance of "diversity of citizenship," will be severely prejudiced unless this Court grants this Petition for Certiorari and makes explicit that its

opinion in *Norfolk & Western Railway* v. *Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L.Ed.2d 689 (1980) does not and was not intended to grant the right or power to U.S. District Courts to preempt state law, which is "outcome determinative", when that law would govern the same litigation if it was in the state court.

The majority opinion of this Court in *Norfolk & Western Railway* v. *Liepelt* is ambiguous. Federal judges throughout the country do not know whether this Court considers that they have the duty to admit evidence of income taxes in wrongful death cases on the basis of Federal Rules of Evidence, even though such evidence would not be admissible under state law, and even though the suits are brought on the basis of state wrongful death statutes, as distinguished from federal statutes, such as the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*

Likewise, Federal Judges do not know whether this Court considers that they have the duty to give an income tax instruction when such an instruction would not be given to the jury if the same case was being tried in the state court.

The United States Court of Appeals for the Seventh Circuit recognized this ambiguity in *Liepelt*:

> The Supreme Court *has left open the question* whether it should extend *Liepelt* to diversity cases based on state law. *See id.* 453 U.S. at 487-88, 101 S.Ct. at 2879-80 (reserving the question whether *Liepelt* would control when federal right of action incorporates state law). 701 F.2d at 1192. (Emphasis supplied)

More recently, a United States District Court Judge was presented with the question whether the *Liepelt* ruling applied to a suit arising out of this occurrence which was tried in New York. The Court there ruled that New York holdings permitted evidence of income taxes so that it was not necessary for that Court to determine whether *Liepelt* preempted state law concerning the income tax issue. However, the New York District Court also recognized the ambiguity of this Court's decision in *Liepelt*:

> The Supreme Court *has left open the question* of whether it should extend *Liepelt* to diversity cases based on state law. Since *Liepelt*, some state courts have adopted its reasoning, and others have rejected it. *Lin* v. *McDonnell Douglas Corp.*, 17 Avi. 18,285, USDC, S.D.N.Y. 79 Civ 3195 (RWS), April 12, 1983 (Emphasis supplied)

In a recent article published in For the Defense, June, 1983, under the title of *Update on the Liepelt Decision*, this publication also recognized the ambiguity of *Liepelt*:

> Since the United States Supreme Court decided *Norfolk & W. Ry. Co.* v. *Liepelt*, 44 U.S. 490 (1980), the courts have generally considered instructions requiring a consideration of taxes and present-day values mandatory in FELA cases. The courts have been divided, however, in applying the *Liepelt* requirements to other civil litigation.

This article reviews eighteen decisions to demonstrate the uncertainty, if not chaos, which *Liepelt* has caused due to the failure of this Court to be explicit in regard to whether the *Liepelt* ruling applies to wrongful death and disability cases which are in U.S. District Courts solely by by reason of diversity of citizenship and which

are *not* based upon any federal statute, such as the Federal Employers' Liability Act.

In the May, 1983 issue of Trial Briefs, published by the Illinois State Bar Association for distribution to the members of the Section on Civil Practice and Procedure, this is stated:

> Evidence Of Income Tax Liability
> Admissible In Tort In Federal Court
> *In re Aircrash Disaster near Chicago, Illinois, on May 25, 1979—Appeals of American Airlines, Inc. and McDonnell Douglas Corporation,* Nos. 81-3083, 81-3084 (Seventh Circuit Court of Appeals, decided February 15, 1983).
>
> In an interlocutory appeal involving the 1979 aircrash disaster of an American Airlines DC-10 jet in Chicago, the Seventh Circuit Court of Appeals reversed a district court ruling and held both (a) that evidence of income tax non-liability is admissible in a wrongful death action in a diversity case based on Illinois law and (b) that the jury should be instructed on such issue in the district court. The court stated that it is clear that in cases involving federal substantive law the evidence of "low taxes" would be admissible under the Federal Rules of Evidence which make all "relevant" evidence admissible.
>
> Notwithstanding that the Illinois Supreme Court has held that evidence of "lost taxes" is not admissible in a *suit for personal injuries* under Illinois law, the Seventh Circuit Court of Appeals "predicted" that, when presented in a wrongful death case, Illinois will hold that such evidence is admissible. The Seventh Circuit reasoned from its conclusions, (1) that the Illinois Supreme Court, in *Hall* v. *Chicago & Northwestern Railway,* 5 Ill.2d 135, 125 N.E.2d 77 (1955), erroneously interpreted federal law to give a tax benefit to the recipient of a personal injury award

by making it nontaxable; (2) that a distinction exists between damages for lost income in a personal injury case and recovery of pecuniary damages in a wrongful death case; and (3) that Illinois courts' approval of the majority rule of exclusion of such evidence in *Hall* was only dictum. The Court of Appeals "predicted" this would be Illinois law, notwithstanding the Illinois Supreme Court's recent announcement in *Elliott* v. *Willis*, 92 Ill.2d 530, 442 N.E.2d 163 (1982): a wrongful death award is *not* to be adjusted to reflect the lost investment earnings of estate funds used to pay premature estate taxes.

The Seventh Circuit *acknowledged that Illinois law is clear: a jury should not be instructed that a damage award in a wrongful death case is not subject to taxation. The court held that the federal court is free to instruct the jury on the tax question, despite contrary state procedure. Illinois practice does not bind the federal courts under Erie Railroad* v. *Tompkins, 304 U.S. 64 (1938), because, the C.C.A. 7 reasoned, Illinois concerns are either procedural or are based on a mistaken view of federal law.*

COMMENT: The Seventh Circuit fails to consider whether the Illinois courts will be willing to change their presently existing rule of not instructing the jury on the question of the effect of taxation on damage awards. If the Court of Appeals' "prediction" is accurate that the Illinois courts will allow evidence of taxation to go to the jury the next time the issue is presented, then the Illinois courts will also have to change the present law on instructing the jury on the issue. Otherwise, the jury will be permitted to consider such evidence without any guidelines from the court. *The Court of Appeals did not consider what effect this will have on the Illinois courts in their "predicting" the present status of Illinois law on the admissibility of taxation evidence.* (Emphasis supplied)

The United States District Court's ruling in the case at bar was made by Judges Edwin A. Robson and Hubert L. Will. Judge Robson, while a state court judge, was appointed by the Illinois Supreme Court to the Illinois Supreme Court Committee on Jury Instructions (Illinois Pattern Jury Instructions, Civil, Second Edition, IPI 2d). The approved, standard instruction (31.04) regarding "Measure of Damages—Wrongful Death—Adult—Lineal Next of Kin Surviving" reads:

> In determining pecuniary loss and the weight to be given to the presumption of pecuniary loss you may consider what benefits of pecuniary value, including money, goods, and services the decedent might reasonably have been expected to contribute to the widow and child (children) had the decedent lived, bearing in mind the following factors concerning the decedent:
>
> 1. What he customarily contributed in the past;
> 2. What he earned or what he was likely to have earned in the future;
> 3. What he spent for customary personal expenses [and other deductions];
> 4. What instruction, moral training, and superintendence of education he might reasonably have been expected to give his [child] [children] had he lived;
> 5. His age;
> 6. His health;
> 7. His habits of industry, sobriety, and thrift;
> 8. His occupation.

In the Comment under this standardized instruction, approved by the Illinois Supreme Court, the factors which are stated as "proper in determining pecuniary damages," include "usual earnings and probability of future earnings," and "prospects of increased earnings from inflation and rise of cost of living." (Instr. 31.04).

Nothing is stated anywhere in the Illinois Supreme Court Pattern Instructions which in any way supports the incredible "prediction" of the Seventh Circuit Court of Appeals to the effect that if the Illinois Supreme Court were to rule on the income tax issue it would admit evidence of income taxes.

There is no instruction in the Illinois Pattern Jury Instructions which in any way is similar to the *Liepelt* instruction regarding the non-taxability of verdicts in wrongful death cases. Nor is there any instruction which advises the jury to consider *in any way* income taxes upon earnings in arriving at its verdict.

If anyone knows the law of Illinois regarding the income tax question, Judges Robson and Will know that law. Judge Robson was Chief of the Law Division of the Circuit Court of Cook County for many years prior to his ascendency to the federal bench. Judge Will was an active Illinois trial lawyer prior to his ascendency to the federal bench. Despite the opinion of Judges Robson and Will that Illinois law precluded evidence of income taxes, and despite the fact that the Pattern Instructions approved by the Illinois Supreme Court have not been changed since *Liepelt*, the Court of Appeals, predicted that the Supreme Court of Illinois would rule otherwise if presented with this issue. Clearly, if the Illinois Supreme Court intended that evidence of income taxes should be admitted in wrongful death cases, the Illinois Pattern Jury Instructions on damages for wrongful death would contain an instruction which would advise the jury in this regard. The District Court, in support of its ruling, pointed out:

> [W]e believe our interpretation is further supported by the absence of any reference to taxation in the

> Illinois Pattern Instructions on damages for wrongful death and the uniform practice in the state trial courts. *The defendants have not been able to point to a single case in which an Illinois court, in an action brought under the state's Wrongful Death Act, granted what they seek here.* 526 F.Supp. 226, at 231. (Emphasis supplied).

We are not here arguing the merits or demerits of the income tax issue. The demerits are set forth in the dissent in *Liepelt*. The issue here is not whether this Court or the Court of Appeals considers evidence of income taxes appropriate in this type of litigation. The issue is whether such evidence and the *Liepelt* type jury instruction are, in fact, "outcome determinative," and whether the law of Illinois precludes such evidence and such instruction so that the United States District Court must apply state law and preclude such evidence and instruction.

The District Court may very well have agreed with the philosophy of the majority of the United States Supreme Court in *Liepelt*. However, Judges Robson and Will properly refused to permit any subjective predilections to interfere with their *duty* to decide the income tax issue just as though they were sitting physically in the Circuit courthouse, three blocks away. The District Court recognized the need to comply with the admonitions of the United States Supreme Court that forum shopping (Federal Court *viz-a-viz* State Court) is to be discouraged:

> [o]ur decision that the issues raised by the parties' motions *in limine* are to be resolved by application of Illinois law rests upon the "realization that it would be unfair for the character or re-

sult of a litigation *materially to differ because the suit had been brought in a federal court.*" *Hanna*, 380 U.S. at 467. That *Erie's* policies of discouraging forum-shopping and avoiding inequitable administration of the laws serve as a better touchstone than does a simple "substantive-procedural" dichotomy is persuasively demonstrated in the First Circuit's opinion in *Turcotte* v. *Ford Motor Co.*, 494 F.2d 173 (1974). 526 F. Supp. at 232. (Emphasis supplied)

In Wright and Miller, *Federal Practice and Procedure: Civil* § 2405 (1971), while discussing Federal Rule 43, the authors point out that where the "question of admissibility of evidence is so interwined with a state substantive rule . . . the state rule excluding the evidence will be followed in order to give full effect to the state's substantive policy."

Evidence of the effect of income taxes upon earnings in wrongful death cases will substantially affect the amount of money the plaintiffs receive, as will an instruction admonishing the jury that its verdict is free from taxes.

Regardless of semantics, the reality, as every trial lawyer and trial judge knows, is that *both* of these issues are, in fact, "outcome determinative." Otherwise, the District Court would not have certified these questions for appeal; nor would the Seventh Circuit Court have granted leave to appeal despite the familiar rule that the Courts of Appeal look with disfavor upon interlocutory appeals involving questions regarding evidence on instructions to the jury.

The majority view in this country is that in fixing damages for loss or impairment of future earnings, income tax consequences are not to be taken into considera-

tion. *See Annot., Propriety Of Taking Income Tax Into Consideration In Fixing Damages In Personal Injury Or Death Action,* 63 A.L.R.2d 1378 (1959, and Supplements thereto).

It is also significant that American Law Reports, in its listing entitled *"View That Income Tax Consequences Should Not Be Considered,"* recognizes *Illinois as one of the many jurisdictions that is in accord with the majority view.* Cited by A.L.R. in this respect are *Hall* v. *Chicago & N.W. Ry. Co.,* 5 Ill.2d 135, 125 N.E.2d 77 (1955) and *Wagner* v. *Illinois Central Ry. Co.,* 7 Ill. App.2d 444, 129 N.E.2d 771 (1955). *See also Louissaint* v. *Hudson Waterways Corp.,* 443 N.Y.S. 678, 111 Misc. 2d. 122 (1981) where the Court (at N.Y.S. page 680) cites *Hall* as one of many cases which support the "prevailing rule throughout the United States," and which confirms that *only six states* permit a reduction of recovery by the amount of taxes.

The Seventh Circuit attempted to distinguish *Hall* on the basis that that suit was brought under the Federal Employers' Liability Act. The Court's reasoning is fallacious. It is founded upon a difference without a legal distinction. This is so because what the Illinois court was doing in *Hall*—and the editors of American Law Reports clearly recognized that what the Illinois court was doing in *Hall*—was simply stating *the policy of the courts of Illinois* as to these issues; namely, that evidence of or reference to income taxes is not permissible in Illinois. Indeed, A.L.R. refers to *Hall* as a "leading case on [this] topic."

In *Raines* v. *New York Central Ry. Co.,* 51 Ill.2d 428, 283 N.E.2d 230, *cert. denied,* 409 U.S. 983 (1972), the

Illinois Supreme Court considered the propriety of an instruction to the jury that an award is not subject to income taxes. The Court ruled in clear and unambiguous language:

> [W]e judge that the trial court correctly refused an instruction that any award in favor of the plaintiff would not be subject to income tax. 283 N.E.2d at 232.

In doing so, the Court quoted with approval *Hall* v. *Chicago and Northwestern Ry. Co.*, 5 Ill.2d 135, at 151-152, (1955) where that Court observed:

> It is a general principle of law that in the trial of a lawsuit the status of the parties is immaterial. Thus, what the plaintiff does with an award, or how the defendant acquires the money with which to pay the award, is of no concern to the court or jury. Similarly whether the plaintiff has to pay a tax on the award is a matter that concerns only the plaintiff and the government. The tortfeasor has no interest in such question. And if the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified. (Quoted in *Raines* at 283 N.E.2d at 232.)

Rather than meeting the issue head-on, and ruling that in diversity actions in the U. S. District Courts, such courts under the authority of *Liepelt*, have the duty to permit evidence of income taxes, regardless of contrary state law, the Court of appeals engaged in the sheerest kind of speculation in "predicting" that the Illinois Supreme Court would rule that such evidence is admissible.

In regard to this issue this Court may take the easy way out and deny this Petition, on the basis that the

Court of Appeals has not ruled directly that *Liepelt* preempts state law on the subject of the admissibility of income tax evidence. The Court of appeals instead speculalated as to what the Illinois Supreme Court would do — when defendants could not point to a *single* wrongful death case *ever* tried in the history of the circuit courts in the 102 counties of the State of Illinois wherein such evidence was admitted.

On the subject of the propriety of an income tax instruction, there are three Illinois Appellate Court decisions, all subsequent to *Liepelt,* which flatly rule that the *Liepelt*-type income tax instruction is not permitted under Illinois law.

In *Johnson* v. *Hoover Water Well Service, Inc.,* 108 App. 3d 994, 439 N.E.2d 1284 (1982), the court said:

> Defendant appeals the trial court's refusal to instruct the jury that personal injury awards are not subject to income taxes. He cites *Norfolk & Western Ry. Co.* v. *Liepelt* (1980), 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689, to support his argument. In *Liepelt,* a case arising out of Illinois, the United States Supreme Court held that a trial court may not refuse an instruction on the tax consequences of a personal injury award in actions arising under the Federal Employers' Liability Act (FELA). 45 U.S.C. § 51 *et seq.*
>
> The Illinois Supreme Court has ruled that it is not error to refuse to instruct the jury as to the taxability of an award. (*Raines* v. *New York Central R. R. Co.* (1972), 51 Ill.2d 428, 283 N.E.2d 230; *Hall* v. *Chicago & Northwestern Ry. Co.* (1955), 5 Ill.2d 135, 125 N.E.2d 77.) Defendant argues that the *Liepelt* decision overrules these cases since they are also FELA cases. We agree that *Hall* and *Raines* have been overruled by *Liepelt with respect to Illinois*

cases arising under the FELA. However, the Liepelt decision does not, and could not, change the Illinois rule in purely state matters where, as here, no federal issues are involved. We, therefore, find *Hall* and *Raines* still controlling here and accordingly find no error in the ruling of the trial court. 439 N.E.2d at 1294, 1295. (Emphasis Supplied).

In *Christou* v. *Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill.App.3d 257, 432 N.E.2d 920 (1982), the court said:

> We finally consider defendant's contention in which, relying on *Norfolk-Western Railway Co.* v. *Liepelt* (1980), 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689, it urges that the trial court erred in refusing to instruct the jury that any verdict for plaintiff would not be subject to income tax. Although the court in that case held that failure to give a similar instruction was reversible error, it specifically stated that the issue was a matter of federal law. The holding in *Liepelt* does not apply to actions predicated on state statutes. (*Croce* v. *Browley Corp.* (5th Cir., 1980), 623 F.2d 1084.) *In such cases we must look to state law. In Illinois the income tax instruction is not required. Raines* v. *New York Central Railroad Co.* (1972) 51 Ill.2d 428, 283 N.E.2d 230. 432 N.E.2d at 925 (Emphasis Supplied).

In *Ciborowski* v. *Philip Dressler & Associates*, 110 Ill. App.3d 981, 443 N.E.2d 618 (1983), the court said:

> Gold Seal [defendant] next contends that the trial court erred when it refused to instruct the jury that its award to plaintiff would not be taxable. The recent case of *Christou* v. *Arlington Park-Washington Park Race Tracks Corp.* (1982), 104 Ill.App.3d 257, 60 Ill.Dec. 21, 432 N.E.2d 920, is dispositive. There the court acknowledged that the law in Illinois is

> that the income tax jury instruction is not required. (104 Ill.App.3d 257, 262, 60 Ill.Dec. 21, 432 N.E.2d 920.) We see no reason to deviate from this position. 443 N.E.2d at 622.

In regard to state, intermediary appellate court decisions the Seventh Circuit referred to *West* v. *A.T.&T.*, 311 U.S. 223, at 237 (1940), with these words: "One possible source of state law is the opinion of an intermediate state court." That is not what *West* held. *West* held:

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.* 311 U.S. at 237 (Emphasis supplied).

West also emphasizes that federal courts should consider the fact that the highest court of the state refused to review rulings of intermediary appellate courts.

The Illinois Supreme Court has not reviewed or reversed any of these Illinois appellate court decisions which rejected the *Liepelt* jury instruction.

The Court of Appeals could point to no "other persuasive data that the highest court of the state [Illinois] would decide otherwise."

All data is precisely to the contrary. There are two issues. One involves the admissibility of income taxes. The other involves the propriety of the income tax instruction. Although the Court of Appeals "predicted" that the Illinois Supreme Court would hold that evidence of income tax is admissible, it admits that Illinois

law precludes the income tax instruction. The question, therefore, is simply this: Is the income tax instruction "out-come determinative" or not? If it is, then regardless of the evidence issue, the Court of Appeals' decision in that regard should be reversed.

The Court of Appeals justifies the giving of this income tax instruction on the ground that this matter is procedural. This is an overly simplistic excuse for permitting an instruction which is, in fact, "outcome determinative." It is true that generally speaking jury instructions may be described as "procedural." However, an admonition by a federal judge to a jury that its verdict is taxfree is a negative instruction which admonishes jurors in a way that will result in lower verdicts. To say that this instruction is merely "procedural" brings to mind the words of H. L. Mencken:

> It reminds me of a string of wet sponges; it reminds me of tattered washing on the line; it reminds me of stale bean soup, of college yells, of dogs barking idiotically through endless nights. It is so bad that a sort of grandeur creeps into it. It drags itself out of a dark abysm . . . of pish, and crawls insanely up the topmost pinnacle of posh. It is rumble and bumble. It is flap and doodle. It is balder and dash.

If the *Liepelt* type income tax instruction is merely procedural, then state court judges may refuse to give that instruction in trials of Federal Employers' Liability Act cases in their courts. State court judges have just as much right as federal court judges to decide "procedural" matters. If decisions of state courts regarding the propriety of instructions under state wrongful death statutes are to be considered as merely "pro-

cedural," then decisions of federal courts, including even the United States Supreme Court, regarding the propriety of instructions under the Federal Employers Liability Act are also merely "procedural," and, therefore, from here on state courts may refuse to give the *Liepelt* instruction in state court trials, on the basis that such an instruction is not in accord with their procedure.

Unless this Court grants this Petition for Certiorari and clarifies this issue, apart from the income tax evidence issue, there will be continuing confusion in regard to the trial of wrongful death cases in state and federal courts, whether based on federal or state statutes.

CONCLUSION

The fact is that various Illinois appellate courts have rejected the *Liepelt* income tax instruction outright, forcefully and unambiguously.

The fact is that the Illinois Supreme Court has not granted leave to appeal as to any of those decisions.

The fact is that the Illinois Supreme Court has appointed a standing Committee, the purpose of which is to prepare standard instructions, including instructions regarding damages in wrongful death cases brought pursuant to the Illinois Wrongful Death Statute, Ill. Rev. Stat. (1979) Ch. 70, §1, 2.

The fact is that these approved standard instructions do not contain a *Liepelt-type* income tax instruction or *any* instruction regarding evidence of income taxes.

The fact is that this Court has failed to make explicit its ruling in *Liepelt* so that lawyers and judges will know what this Court intended to rule in regard to cases which are in the federal court only by reason of diversity of citizenship, and which are based on state statutes and not on any federal statute.

The fiction of diversity of citizenship as a basis for federal court jurisdiction should reach its demise. There was a time when non-resident defendants needed the protection of the federal courts—back in the era of the Wild West. Multistate and multinational companies, such as American Airlines and McDonnell Douglas Corporation, have many significant places of business. The determination of their principal places of business can present difficult fact questions. Jurors do not know and do not care about this factual question. The use of diversity of citizenship by large corporations to get suits against them into the federal courts, so that they can get the benefit of rulings in regard to evidence and jury instructions,which, in fact, determine the outcome of the litigations should be emphatically stopped by this Court.

This petition presents an ideal vehicle for this Court to straighten out an intolerable situation, due to *Liepelt's* ambiguity, for which there is no other word but "mess." The diversity basis for jurisdiction has become ludicrous —when the United States Court of Appeals for the Seventh Circuit has now rendered a decision which results in those plaintiffs who are in federal court being the objects of severe discrimination against them, as compared to plaintiffs whose suits are in state courts.

The fact is that regardless of semantics, federal court plaintiffs will receive a great deal less than state court

plaintiffs. If this does not meet the definition of "out-come determinative," nothing does.

If this Court wants to prevent chaotic condition in the practice of law in this country, involving wrongful death and injury cases, it should grant this Petition for Certiorari, accept the fact that Illinois law precludes both evidence of income taxes and the *Liepelt*-type instruction, and make explicit, once and for all, that federal court judges must sit as state court judges in suits which are in federal court only by reason of diversity of citizenship and which are not in any way based upon federal statutes or federal law, as to all out-come determinative issues; and instruct U.S. District Court judges that "out-come determinative" means exactly that.

Respectfully submitted,

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APPENDIX

In re AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979

This Document Relates to,

Syed HAIDER, as Administrator of the Estate of Victoria Chen Haider, Deceased, Plaintiff,

v.

McDONNELL DOUGLAS CORPORATION, a corporation; and American Airlines, Inc., a corporation, Defendants.

MDL 391.

No. 79 C 2444.

United States District Court, N. D. Illinois, E. D.

Nov. 17, 1981.

John J. Kennelly, Chicago, Ill., for plaintiff Syed Haider.

Norman J. Barry and Christoper G. Walsh, Jr., Rothschild, Barry & Myers, Chicago, Ill., for defendant McDonnell Douglas Corp.

Thomas D. Allen, Robert E. Haley, Elise E. Singer, Wildman, Harrold, Allen & Dixon, Chicago, Ill., for defendant American Airlines, Inc.

William P. Butler and C. Kevin McCabe, Lord, Bissell & Brooke, Chicago, Ill., for Motor Vehicle Mfrs. Ass'n of the United States, Inc. (amicus curiae).

ROBSON and WILL, District Judges.

MEMORANDUM AND ORDER

Victoria Chen Haider, a resident of Illinois, was one of 273 people who died in the crash of an airplane, built by McDonnell Douglas Corporation (MDC), and owned and operated by American Airlines (American), outside Chicago on May 25, 1979. The wrongful death action brought by her husband (who is still a resident of Illinois), as the administrator of her estate, was consolidated with approximately 150 others for pretrial proceedings in this Court. Federal jurisdiction is based upon diversity of citizenship under 28 U.S.C. § 1332.

Defendants seek to introduce evidence as to the portion of the decedent's past earnings which were subject to taxation, and evidence as to the percentage of any future earnings which would have been paid as taxes had the decedent lived. Defendants also seek to have the jury instructed that:

> If you decide to award any damages to the plaintiff, your award will be exempt from any income taxes; therefore, in fixing the amount of your award,

you should not be concerned about or consider the effect of taxes on the award.[1]

Plaintiff Seyd Haider opposes both the introduction of this evidence and the giving of instructions as to the tax status of damages awards. Both plaintiff and defendant MDC have filed motions *in limine* seeking a determination of these issues. For the reasons hereinafter stated, we grant plaintiff's motion and deny defendant's motion.[2]

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[1] The Internal Revenue Code's treatment of damages for wrongful death is more complex than MDC's requested instruction states it to be. Only the principle of a damages award is free from federal income taxation. Interest earned on the invested principle—a component of "just compensation," given the fact that juries are instructed to reduce awards to present value to account for reasonable investment opportunities—is, however, subject to federal income taxation. 26 U.S.C. § 104(a)(2); Rev.Rul. 54—19, 1954—1 C.B. 179; Rev.Rul. 65—29, 1965—1 C.B. 59. Moreover, in some of these cases, the plaintiff-survivor will have to pay federal taxes on this investment income as a single taxpayer, whereas, had the decedent not died, federal taxes on these earnings would have been paid on a joint-return basis. Because of the different tax rates imposed on the earnings of single and married taxpayers, the investment income from a damages award will be subject to higher taxes than would the same earnings had they accrued to the decedent over the course of a normal life-expectancy. Ward and Olson, *The Economic Impact of Income Tax on Damage Awards,* 17 Trial 47, 48 (No. 8, August, 1981).

[2] Plaintiff raised and briefed his motion as one which pertains to *Haider.* American designated its answer to plaintiff's motion and supporting memorandum as pertaining to *Haider* and to two other cases. Finally, MDC designated its cross-motion and memoranda as pertaining to *Haider,* the two cases identified by American, and several other of the cases which have been transferred to this Court for pretrial proceedings. Our focus

We note preliminarily that the questions whether evidence of the effect of taxation upon earnings is admissible, and whether the jury should be instructed as to the tax status of any award, are separate issues. Nordstrom, *Income Taxes and Personal Injury Awards*, 19 Ohio St. L.J. 212, 219-21 (1958). But in the context of an action whose federal jurisdiction rests upon diversity of citizenship, our inquiry is limited to two issues: (1) Whether the determination of the issues raised in the parties' motions is to be made pursuant to Illinois law or federal law, and (2) whether Illinois law, if it applies, would lead to a different result than would federal law. Because there would be no need to determine whether Illinois or federal law governs the resolution of the issues raised in these motions if application of either Illinois law or federal law led to the same result, we address first the question whether Illinois law and federal law would resolve these issues differently.

I.

Federal law, if applicable to an action whose jurisdiction rests on diversity of citizenship, would require that we admit evidence of the effect of taxation upon the decedent's estimated capacity to contribute to the support of her family. The admissibility of this evidence is governed by the concepts of materiality and relevance. *See* Rules 401-03, Federal Rules of Evidence (FRE). Because "just compensation" under the Illinois Wrongful Death Act[2]—the source of plaintiff's substantive rights

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[1] (Continued)

in this opinion is upon *Haider*, but we regard the effect of this opinion as extending at least to all other cases in which the plaintiff and the decedent are and were domiciliaries of Illinois.

[2] Ill.Rev.Stat. ch. 70, § 2 (1979) states, in pertinent part:

> Every such action shall be brought by and in the names of the personal representatives of such de-

in this action—is restricted to the "pecuniary loss" sustained by the decedent's survivors, *Kaiserman* v. *Bright*, 61 Ill.App.3d 67, 18 Ill.Dec. 108, 377 N.E.2d 261, 263 (1978), evidence of the effect of taxation upon earnings is "of consequence to the determination" of "just compensation." Rule 401, FRE. Defendants correctly state that, because the focus of the Illinois Wrongful Death Act is on the decedent's contributions to her survivors rather than on her earnings, the amount which would have been taken in taxation is relevant to the determination of the portion of her earnings which would have been or could have been contributed to her survivors.

The conclusion that federal law would probably admit evidence of the effect of taxation upon a decedent's earnings, subject to the limitations of Rule 403, receives some support from the Supreme Court's recent decision in *Norfolk & Western Ry* v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). In *Liepelt*, the Court held that an Illinois state court erred in refusing evidence as to taxation of the decedent's earnings in a wrongful death action brought under the Federal Employers Liability Act (FELA).[4] The Court noted that the FELA, in addition to seeking to "'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees," is compensation oriented. 444 U.S. at 493 and n.5, 100 S.Ct. at 757, *quoting* from H.R. Rep.No. 1386, 60th Cong., 1st Sess. 3 (1908). It reasoned that "after-tax income . . . provides the only realistic

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[3] (Continued)

> ceased person, and . . . the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person.

[4] 45 U.S.C. §§ 51 *et seq.* (1976).

measure of [a person's] ability to support [others]," and that a wage earner's income tax is therefore relevant to a determination of the monetary loss suffered by her family when she dies. 444 U.S. at 493-94, 100 S.Ct. at 757-58.

Similarly, it appears that federal law, if applicable, would require that we instruct the jury that under section 104(a)(2) of the Internal Revenue Code, the principle of an award for damages is not taxable. Both defendants argue essentially that *Liepelt*, if applicable to a diversity action, requires giving the requested instruction. American points to the compensatory nature of both the FELA and the Illinois Wrongful Death statute. MDC argues that the instruction is merely cautionary. MDC notes that the giving of cautionary instructions is generally within the discretion of the trial court, *Simineo* v. *School District No. 16*, 594 F.2d 1353, 1357 (10th Cir. 1979); *Krieger* v. *Bausch*, 377 F.2d 398, 402 (10th Cir. 1967), but claims that *Liepelt* demonstrates that in certain circumstances cautionary instructions are mandated when requested by a party. Our reading of *Liepelt*, however, convinces us that the Court did not intend its holding in that case to be read so broadly. *Liepelt* dealt with the narrow realm of actions brought under the FELA, and did not purport to address the issues of the admissibility of evidence and the propriety of instructions, concerning taxation, outside the context of the FELA. *Estate of Spinosa*, 621 F.2d 1154 (1st Cir. 1980); *Croce* v. *Bromley Corp.*, 623 F.2d 1084 (5th Cir. 1980); *Fenasci* v. *Travelers Ins. Co.*, 642 F.2d 986 (5th Cir. 1981); *see also Vasina* v. *Grumman Corp.*, 644 F.2d 112 (2d Cir. 1981). Some clarification of *Liepelt* is provided in *Gulf Offshore Co.* v. *Mobil Oil Corp.*, ... U.S. ....., 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), an action for personal injuries brought under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 *et seq.*, which raised the question whether Louisiana law permits or precludes instructing the jury concerning the taxability of an award

but did not present the question whether evidence showing the effect of income taxes on past and future earnings is admissible. The Court noted that the OCSLA, unlike the FELA, explicitly authorizes the adoption of state law to the extent that it is not inconsistent with federal law. The Court noted that *Liepelt* was based on the need for uniformity in FELA actions. The Court stated that *Liepelt,* because the FELA afforded no guidance as to whether juries must be instructed on the status of compensatory damages, had announced a "federal common law rule." 101 S.Ct. at 2878-80. The Court added that Congress, in providing that the OCSLA incorporates applicable state law, "'specifically rejected national uniformity' as a paramount goal" in the OCSLA. *Id.* at 2880, *quoting Chevron Oil* v. *Huson,* 404 U.S. 97, 104, 92 S.Ct. 349, 354 30 L.Ed.2d 296 (1972). The Court remanded *Gulf Offshore* to the Texas Court of Civil Appeals for a determination of whether Louisiana law requires giving an instruction as to the taxability of a damages award, and, if it does not, whether *Liepelt* displaces the state rule in OCSLA cases.

Gulf Offshore indicates that the "federal common law rule" of *Liepelt* is limited to situations similar to those in which it arose. We assume, however, for the sake of argument, that federal law requires giving the instruction in addition to admitting evidence as to taxation, and we proceed to a determination of whether Illinois law provides otherwise.

Neither the Illinois Wrongful Death Act nor the Illinois Pattern Instructions concerning the calculation of damages in wrongful death cases, IPI (Civil) § 31.01-.03, contains any reference to the use of evidence as to a decedent's after-tax income to establish the pecuniary loss to the decedent's survivors or to the tax treatment accorded damages by the Internal Revenue Code. Before *Liepelt,* Illinois prohibited, in FELA actions brought in state court, both the introduction of evidence on the effect of taxes upon earnings and giving the jury instructions as to the non-taxable nature of compensation for damages. *Hall* v. *Chicago & N.W.Ry.,* 5 Ill.2d 135,

125 N.E.2d 77 (1955); *Raines* v. *N.Y. Central R.R.*, 51 Ill.2d 428, 283 N.E.2d 230, *cert. denied*, 409 U.S. 983, 93 S.Ct. 322, 34 L.Ed.2d 247 (1972). Currently, Illinois follows *Liepelt* in FELA actions. *Crabtree* v. *St. Louis-San Francisco Ry.*, 89 Ill.App.3d 35, 44 Ill.Dec. 113, 411 N.E.2d 19 (1980); *Oltersdorf* v. *Chesapeake & Ohio Ry.*, 83 Ill.App.3d 457, 38 Ill.Dec. 896, 404 N.E.2d 320 (1980). No Illinois cases, either before or after *Liepelt*, have decided these issues in non-FELA actions. The Illinois Appellate Court determined in a pre-*Liepelt* decision that the defendant had not preserved the evidentiary issue for appeal. *Peluso* v. *Singer General Precision, Inc.*, 47 Ill.App.3d 842, 8 Ill.Dec. 152, 365 N.E.2d 390 (1977). (The defendants in *Peluso* did not seek jury instructions on the taxation of damage awards.) In *dictum*, the *Peluso* court noted that FELA cases are not controlling where the issue arises under the state Wrongful Death statute. 365 N.E.2d at 399. In a concurring opinion in *Peluso*, Judge Sullivan considered the merits, and would have permitted the defendants to establish the fact that the plaintiff's expert witness did not include income taxes in his estimate of the plaintiff's lost future earnings. 365 N.E.2d at 401-04. In *Yakstis* v. *William J. Diestelhorst Co.*, 61 Ill. App.3d 833, 19 Ill.Dec. 90, 378 N.E.2d 591 (1978), the Illinois Appellate Court stated that "the [decedent's] tax return was relevant evidence of the economic status of the decedent, and would tend to show the economic loss caused by his death." However, the plaintiff, rather than the defendant, introduced into evidence the decedent's tax return in *Cakstis*. 378 N.E.2d 596.[5] *Yakstis*, of course, was decided before *Liepelt*, yet

[5] The plaintiff's reasons for introducing the decedent's tax return into evidence in *Yakstis* are not clear from the Illinois Appellate Court's opinion. The decedent was self-employed as a truck driver. 378 N.E.2d at 593. That his tax return was the only evidence of the decedent's earnings would appear to be a logical inference from the nature of his employment and the defendant's objection to its admission into evidence.

its brief discussion of the relevance of the decedent's tax return to the economic loss which his survivors suffered as a result of his death does not mention *Hall, Raines,* or any of the other pre-*Liepelt* Illinois cases which held such evidence inadmissible when offered by the defendants.

Neither the Illinois Appellate Court's post-*Liepelt* decisions, nor its opinion in *Yakstis,* nor Judge Sullivan's concurring opinion in *Peluso,* provide much guidance as to whether the Illinois Supreme Court would apply the holdings of *Liepelt* to actions arising under the Wrongful Death Act. In the absence of definitive state authority, a federal court sitting in diversity jurisdiction must endeavor to interpret state law in the manner in which the Supreme Court of the state would interpret it if faced with the same issue. *Huff* v. *White Motor Corp.,* 565 F.2d 104, 106 (7th Cir. 1977); *Hartford* v. *Gibbons & Reed Co.,* 617 F.2d 567, 569 (10th Cir. 1980); *Bearce* v. *United States,* 433 F.Supp. 549, 552 (N.D.Ill. 1977).

In doing so, the federal court should consider all the data—including compelling inferences, logical implications from other related adjudications, and considered pronouncements—which the highest court of the state would consider. *Huff,* 565 F.2d at 106; *Bearce,* 433 F. Supp. at 552. In the absence of other authority, we take the Illinois Supreme Court's decisions in *Hall* and *Raines, supra,* although overruled by *Liepelt* insofar as they governed FELA actions, as expressing the position of the Illinois courts on these issues in actions arising under the state Wrongful Death statute. Our interpretation of Illinois law on these issues is necessarily somewhat speculative. Indeed, having to rely upon overruled cases as evidence of how another court would likely rule on issues if they arose in a different posture strikes us as only slightly more reliable than predictions of the future arrived at by reading the entrails of sheep. But we believe our interpretation is further supported by the absence of any reference to taxation in the Illinois

Pattern Instructions on damages for wrongful death and the uniform practice in the state trial courts. The defendants have not been able to point to a single case in which an Illinois court, in an action brought under the state's Wrongful Death Act, granted what they seek here.

Estate of Spinosa, 621 F.2d 1154, 1158 (1st Cir. 1980), presented a similar instance of uncertainty as to whether the applicable state law admitted evidence on the impact that taxes would have on a decedent's future earnings. The First Circuit held in *Spinosa* that in the absence of New Hampshire case law on the issue, the district court's refusal to admit the evidence, relying on the "majority rule" that such evidence is inadmissible, *see* Annot., 63 A.L.R.2d 1393 & updates, was proper.

Although neither federal nor Illinois law is unambiguous as to the issues that the parties raise, the most logical and likely conclusion is that federal law, if free from constraints imposed in diversity jurisdiction, would admit evidence and give an instruction as to taxation and damage awards, while Illinois law precludes both admission of this evidence and the giving of an instruction. We therefore turn to the question of which law we must apply.

II.

A federal court sitting in diversity shopud apply the substantive law of the state in which it sits. *Erie Railroad* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1939). Additionally, Illinois law is to be applied to substantive questions in this litigation when the decedent and the plaintiff were and are domiciliaries of Illinois. *In re Air Crash Disaster Near Chicago,* 644 F.2d 633, 637 (7th Cir. 1981). *Erie* does not, however, require application of state law in matters of evidence and procedure. *Hanna* v. *Plumer,* 380 U.S. 460, 464-74, 85 S.Ct. 1136, 1140-45, 14 L.Ed.2d 8 (1965).

Defendants argue that evidence and instructions on taxation, rather than pertaining substantively to the measure of damages, are procedural. We do not believe that an analysis based on the "substantive-procedural" dichotomy resolves the question whether we must apply federal or state law. To ask whether an issue is "substantive" or "procedural" disposes of the ultimate question of whether federal or state law applies only when it is clear that the issue is either substantive or procedural. To limit analysis to application of the substantive-procedural dichotomy is not helpful when confronted with "matters, falling within the uncertain area between substance and procedure, [that] are rationally capable of classification as either." *Hanna* v. *Plumer*, 380 U.S. 460, 472, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965). Indeed, the Supreme Court has repeatedly recognized that "[t]he line between 'substance' and 'procedure' shifts as the legal context changes. 'Each implies different variables depending upon the particular problem for which it is used.'" *Hanna*, 380 U.S. at 471, 85 S.Ct. at 1144, *quoting Guaranty Trust* v. *York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1945).

In general, the admissibility of evidence and the giving of cautionary instructions are procedural matters and hence the law of the forum applies to them. There is no question that the form in which defendants would have the decedent's financial status established and the manner in which the defendants would have a jury calculate its damages award have procedural aspects. But it is just as logical to view the manner in which this evidence is introduced and the instructions as to the importance that the jury should give this evidence as affecting the measure of damages and hence substantive in nature. Whether we admit or exclude this evidence, and whether we give or do not give this instruction, will materially affect the amount of the jury's award. We do not conclude that defendants' characterization of these issues as "procedural"

is necessarily inaccurate, and that these issues are wholly "substantive." The point is that these issues are both substantive *and* procedural, and we see no rational basis for concluding that either of them leans toward one rather than the other label.

Instead, our decision that the issues raised by the parties' motions *in limine* are to be resolved by application of Illinois law rests upon the "realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court." *Hanna,* 380 U.S. at 467, 85 S.Ct. at 1141. That *Erie's* policies of discouraging forum-shopping and avoiding inequitable administration of the laws serve as a better touchstone than does a simple "substantive-procedural" dichotomy is persuasively demonstrated in the First Circuit's opinion in *Turcotte* v. *Ford Motor Co.,* 494 F.2d 173 (1974). In *Turcotte,* the court rejected plaintiff's contention that federal law governed the admissibility of the effect of income taxes on earnings in a diversity wrongful death action where the applicable state law permitted consideration of income tax returns. It therefore determined that *Erie* required application of the state law. The court noted that the concern of *Erie* and its progeny was both to discourage forum-shopping and to avoid inequitable administration of the laws. Therefore, it concluded, application of the law which would be applied in the state court was required.

> [I]f Rhode Island law required evidence of income taxes in computing wrongful death damages, yet the federal district court in Rhode Island barred such evidence in diversity cases, no rational plaintiff who had the choice would ever bring a wrongful death action in the state courts. The difference in wrongful death recoveries between the two forums would be staggering.

Id. at 185.

The converse is also true. If Illinois does not admit such evidence, its admission in the federal court, particularly where only state law may be otherwise applied, would promote "inequitable administration of the laws."

We think it important to emphasize what we have not done in ruling upon these motions *in limine*. We have not, as a federal court sitting in diversity, decided whether it would be desirable to admit evidence of the effect of taxation upon earnings or to give some instruction to the jury as to the tax status of compensation for damages or how taxation should affect the calculation of damages. Nor would it be proper for us to do so. *Erie, supra.* The competing policy considerations have been analyzed in detail by various courts and commentators, *see, e.g., Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980) and 444 U.S. at 498, 100 S.Ct. at 759 (Blackmun, J., dissenting); *Domeracki* v. *Humble Oil & Refining Co.,* 443 F.2d 1245 (3d Cir.), *cert. denied,* 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971); *McWeeney* v. *N.Y., N.H. & Hartford R.R.,* 282 F.2d 34 (2d Cir. 1960); *Huddell* v. *Levin,* 395 F.Supp. 64 (D.N.J. 1975); D. Dobbs, Remedies 575-79 (1973); Nordstrom, *Income Taxes And Personal Injury Awards,* 19 Ohio St. L.J. 212 (1958), and we see no reason to add unnecessarily to the girth of some future volume of the Federal Supplement by repeating them here. Under present law, the decision is one either for the Illinois legislature and the Illinois courts or the Congress of the United States rather than for us. Our decision is limited to a finding that Illinois law and federal law would resolve these issues differently, and that the principles first enunciated in *Erie* require us to apply Illinois law.

We are constrained to observe once again that the result of the application of state law in aviation disaster cases is inevitably to create substantial disparity in the applicable law depending on the particular state or federal court in which the case is filed or tried. The crash here involved is typical. Residents of a number

of states and foreign countries were passengers. Their survivors are also residents of a number of jurisdictions, not necessarily the same as the decedents. Cases have been filed in various state and federal courts. The federal cases have all been transferred to us under 28 U.S.C. § 1407. As discovery is completed, if the parties so desire, we have remanded a number of cases to the transferor courts for trial. Those cases originally filed in this district will, of course, remain here. As this opinion indicates, whether evidence and instructions with respect to federal and state income taxes will be permitted depends on the applicable state law. As is obvious, this will result in substantial differences in the damage calculations in the various cases.

We have previously urged the enactment of a federal aviation disaster law which would make uniform the legal principles applicable in aviation disaster cases. It is unjust as well as ludicrous that such issues as the standard of liability (no-fault, comparative negligence, contributory negligence), the measure of damages, whether or not prejudgment interest in an element of damages, whether or not damages for pain and suffering are recoverable, whether or not punitive damages are recoverable, whether or not federal and state income taxes should be considered in determining damages, the applicable statute of limitations and a host of other important issues should vary from case to case arising out of the same disaster depending on the vagaries of the applicable state law.

Even the determination under conflicts of law principles of what is the applicable state law presents complex questions and results in an unnecessary burden on the courts as the earlier opinions of this Court and the court of appeals on the issue of punitive damages demonstrate. We and the court of appeals have also had to consider and determine whether or not prejudgment interest is a proper element of damages and, it is obvious, we and the court of appeals will also have

considered the income tax questions dealt with in this opinion. All of the foregoing would be obviated by the enactment of a federal aviation disaster statute. Both the best interests of justice to the affected parties and of a sensible utilization of judicial resources would be served by such a statute.

Plaintiff and both defendants have requested certification under 28 U.S.C. § 1292(b) of our order as to these issues. Section 1292(b) provides for immediate appeal of an otherwise nonappealable interlocutory order which the district court and the court of appeals determine (1) involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Certification under section 1292(b) is reserved for exceptional cases, *Seven-Up Co.* v. *O-So Grape Co.*, 179 F.Supp. 167 (S.D.Ill. 1959), and was not intended as a means of expediting review merely because an order involves an important legal question. *Bobolakis* v. *Compania Panamena Maritima San Gerassimo*, 168 F.Supp. 236, 239 (S.D.N.Y. 1958); *see* 1958 U.S.Code Cong. & Adm. News 5260-61.

We agree that whether evidence on the effect of taxation upon earnings is admissible, and whether the jury must be instructed as to the taxability of damages, in an action in which federal jurisdiction is based upon diversity of citizenship, are issues to which "substantial ground for difference of opinion" exists. Earlier paragraphs of this opinion illustrate that whether Illinois or federal law applies to these issues requires an examination of whether they are more fairly characterized as substantive or procedural. Our conclusion that both labels are apt recognizes that the issues might possibly be characterized as either substantive or procedural. We also noted that Illinois law on these issues is uncertain after *Liepelt*.

We also believe that these issues are "controlling issues of law," particularly since the only issue to be tried in all of these cases will be the issue of damages. Any decision on these issues will almost inevitably influence the amount of damages that the jury will award.

Moreover, any early appellate decision will enable at least the judges trying the cases in this district to know how to proceed with respect to evidence and instructions as to the income tax questions. In addition, it will obviate the need to re-try any such case if the Seventh Circuit were ultimately, after a trial, to reverse our decision on these issues. The substantial number of cases affected and the possibility that some will be transferred to other courts for trial increase the advantage of obtaining a final determination of these issues before trial.

We would hope that the court of appeals will expedite its ruling since a number of cases are ready for trial. The parties' motion for certification under 28 U.S.C. §1292(b) will be granted with a recommendation for expedited consideration.

An order consistent with all of the foregoing will enter.

In re AIR CRASH DISASTER NEAR CHICAGO, ILLINOIS ON MAY 25, 1979.

Appeals of AMERICAN AIRLINES, INC. and McDonnell Douglas Corporation, Defendants-Appellants.

Nos. 81-3083, 81-3084.

United States Court of Appeals, Seventh Circuit.

Argued May 7, 1982.

Decided Feb. 15, 1983.

Rehearing Denied March 31, 1983.

Thomas D. Allen, Wildman, Harrold, Allen & Dixon, Chicago, Ill., Norman J. Berryman, for defendants-appellants.

John J. Kennelly, David A. Novoselsky, Chicago, Ill., for appellee.

Before COFFEY, Circuit Judge, SWYGERT, Senior Circuit Judge, and TEMPLAR, Senior District Judge.*

SWYGERT, Senior Circuit Judge.

This diversity case involves the wrongful death actions filed by the survivors of certain victims of the crash near Chicago on May 25, 1979, of a DC-10 aircraft manufactured by defendant McDonnell Douglas Corporation and owned by defendant American Airlines. Many of these actions, either filed in or removed to federal court, were consolidated for pretrial proceedings in the United States District Court for the Northern District of Illinois by an order of the Judicial Panel on Multidistrict Litigation. *In re Air Crash Disaster,* 476 F.Supp. 445, 449 (Jud.Pan.Mult.Lit.1979). This interlocutory appeal from the district court's ruling on the parties' motions *in limine* raises two issues: first, whether a federal court sitting in diversity and applying the Illinois Wrongful Death Act,[1] *see In re Air Crash Disaster,* 644 F.2d 633, 637 (7th Cir.1981), may admit evidence of the income tax liability the decedent would have incurred on the earnings lost be-

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* The Honorable George Templar, United States Senior District Judge for the District of Kansas, sitting by designation.

[1] Ill.Rev.Stat. ch. 70, ¶¶ 1—2.2. (1981). Section 2 of the Act provides in part:

> Every [wrongful death] action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise here-

cause of premature death, as an aid to accurate computation of the survivor's loss; and second, whether the court may instruct the jury that whatever award it makes will not be subject to federal income tax in the hands of the survivor.[2] The district court held that under the principles of *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), it was bound to apply state law, and that Illinois courts would reject both the evidence and the jury instruction. *In re Air Crash Disaster*, 526 F.Supp. 226 (N.D.Ill. 1981). Because we hold that state and federal law do not differ on the evidence issue, we reverse that portion of the judgment. On the jury instruction issue, we reverse because *Erie* is inapplicable.

It is clear that in cases involving federal substantive law the evidence of "lost taxes" would be admissible and the jury instruction on the nontaxability of the award would be proper, in appropriate circumstances. In *Norfolk & Western Railway* v. *Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), the Supreme Court held that in cases brought under the Federal Employers'

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[1] (Continued)

inafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person.

[2] I.R.C. § 104(a)(2) excludes from gross income "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." This section has been interpreted to include damage awards in wrongful death actions. *See* Rev.Rul. 54-19, 1954-1 C.B. 179; *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 496 & n. 12, 100 S.Ct. 755, 759 & n. 12, 62 L.Ed.2d 689 (1980).

Liability Act ("FELA") even state courts may not prohibit the admission of such evidence or the use of that instruction, reversing a decision of the Illinois Appellate Court, 62 Ill.App.3d 653, 19 Ill.Dec. 357, 378 N.E. 2d 1232 (1978), and overruling the Illinois Supreme Court's practice under FELA, *see Raines* v. *New York Central Railroad,* 51 Ill.2d 428, 430, 283 N.E.2d 230, 232 (1972); *Hall* v. *Chicago & North Western Railway,* 5 Ill.2d 135, 149-52, 125 N.E.2d 77, 85-86 (1955). Subsequent cases have adopted *Liepelt's* reasoning in non-FELA federal contexts. *See,* e.g., *Fanetti* v. *Hellenic Lines Ltd.,* 678 F.2d 424, 431 (2d Cir. 1982) (Longshoremen's and Harbor Workers' Compensation Act); *Austin* v. *Loftsgaarden,* 675 F.2d 168, 183-84 (8th Cir. 1982) (Securities Act of 1933 and Securities Exchange Act of 1934). *See also Gulf Offshore Co.* v. *Mobil Oil Corp.,* 453 U.S. 473, 498 & n. 17, 101 S.Ct. 2870, 2880 & n. 17, 69 L.Ed.2d 784 (1981). The Supreme Court has left open the question whether it should extend *Liepelt* to diversity cases based on state law. *See id.* 453 U.S. at 487-88, 101 S.Ct. at 2879-80 (reserving the question whether *Liepelt* would control when federal right of action incorporates state law).

The defendants urge that we reverse the district court on both the evidence and the jury instruction issues. On the former, they argue that the existence of the Federal Rules of Evidence, which apply even in diversity cases, *see* Fed.R.Evid. 101, 1101(b), and which declare relevant evidence admissible, *see* Fed.R.Evid. 402,[*] make

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[*] Rule 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Erie inapplicable; and that Fed.R.Evid. 401, as construed by *Liepelt*, provides the federal definition of relevancy in this kind of case.[4] In addition, they argue that state law is identical to federal law on this issue in any case. On the jury instruction issue, they argue that *Hall* and *Raines*, the only Illinois Supreme Court precedents on point, are overruled by *Liepelt*, because they arose under FELA; and that we should predict that the Illinois Supreme Court would now find the reasoning of *Liepelt* persuasive. Alternatively, they argue that because the substance of the proposed instruction relates to the Internal Revenue Code, federal law should govern whether the instruction should be given, even in a diversity case. We address these issues in turn.

I. Admissibility of Evidence

We agree that the Federal Rules of Evidence apply and that as a consequence the district court may not categorically exclude certain kinds of evidence relevant to the determination of damages. If the rules had been promulgated under the Supreme Court's rulemaking power, 28 U.S.C. § 2072 (1976), and did not transgress the limits of that power, this would be true under the reasoning of *Hanna* v. *Plumer*, 380 U.S. 460, 370—71, 85 S.Ct.

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[4] Rule 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Liepelt held that evidence of the income tax that would have been due on lost income is "demonstrably relevant," 444 U.S. at 495, 100 S.Ct. at 758, in a wrongful death action under FELA, whose "measure of recovery is 'the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received,'" *id.* at 493, 100 S.Ct. at 757, quoting *Michigan Cent. R.R.* v. *Vreeland*, 227 U.S. 59, 70, 33 S.Ct. 192, 196, 57 L.Ed. 417 (1913).

1136, 1143—44, 14 L.Ed.2d 8 (1965). But the Rules of Evidence stand on even firmer footing, for they are statutory. Pub.L. No. 93—595, 88 Stat.1959 (1975). In such a case the Rules of Decision Act, 28 U.S.C. § 1652 (1976), coupled with the supremacy clause of the United States Constitution, demands that the rules apply in federal court, unless Congress exceeded its powers to regulate federal courts in enacting them. The parties have not urged us to find, and we are not prepared to hold, that the rules are unconstitutional. *See* 10 J. Moore & H. Bendix, *Federal Practice* § 57 (2d ed. 1982).

Our conclusion is supported by many cases holding that the Federal Rules of Evidence govern the admissibility of evidence in diversity cases. *See, e.g., Rabon* v. *Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238 n. 14 (5th Cir. 1982); *Garwood* v. *International Paper Co.*, 666 F.2d 217, 223 (5th Cir. 1982); *Southern Stone Co.* v. *Single*, 665 F.2d 698, 701 (5th Cir. 1982); *Ballou* v. *Henri Studios, Inc.*, 656 F.2d 1147, 1153 (5th Cir. 1981); *Croce* v. *Bromley Corp.*, 623 F.2d 1084, 1094 (5th Cir. 1980), *cert. denied*, 450 U.S. 981, 101 S.Ct. 1516, 67 L.Ed. 2d 816 (1981); *Johnson* v. *William C. Ellis & Sons Iron Works, Inc.*, 609 F.2d 820, 821-22 (5th Cir. 1980); *Pollard* v. *Metropolitan Life Insurance Co.*, 598 F.2d 1284, 1286 (3d Cir.), *cert. denied*, 444 U.S. 917, 100 S.Ct. 232, 62 L.Ed.2d 171 (1979); *Gibbs* v. *State Farm Mutual Insurance Co.*, 544 F.2d 423, 428 n. 2 (9th Cir. 1976). *See also Oberst* v. *International Harvester Co.*, 640 F.2d 863, 867 n. 2 (7th Cir. 1980) (Swygert, J., concurring in part and dissenting in part). This result conforms with the practice of federal courts preceding the adoption of the Federal Rules of Evidence. See 10 J. Moore & H. Bendix, *Federal Practice* § 400.12[6]-(3) (2d ed. 1982) (in fashioning broad rules of admissibility, federal courts adopted state rules that favored admission but rejected state rules that favored exclusion); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2405 (1971 & Supp. 1982) (same).

It does not follow, however, that state evidence rules have no bearing on what evidence is admissible in federal court, for the relevance of the evidence is ascertainable only by reference to the substantive law of the state. To the extent that the state evidentiary rule defines what is sought to be proved—here, the measure of damages—it may bind the federal court under *Erie* principles.

If Illinois followed the rule of the majority of state courts that evidence of would-be tax liability is inadmissible for the purpose of proving the amount of damages, *see* cases collected in Annot., 63 A.L.R.3d 1393 (1975 & Supps); *Louissaint* v. *Hudson Waterways Corp.*, 111 Misc.2d 122, 125-26, 443 N.Y.S.2d 678, 680-81 (N.Y. Sup.Ct. 1981), this subsidiary *Erie* problem would be quite difficult. Courts have supplied several rationales for the exclusionary rule: they have argued that the calculation of net income is too speculative or confusing because of tax rate fluctuations and the difficulty of predicting exclusions and exemptions to which the decedent would have been entitled, *see, e.g., McWeeney* v. *New York, New Haven & Hartford Railroad,* 282 F.2d 34, 35-36 (2d Cir.), (*en banc*), *cert. denied,* 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93 (1960); that inaccuracies resulting from the projection of gross rather than net income are offset by the undercompensating effects of ignoring inflation and attorney's fees, *see, e.g., id.* at 38; and that by making the award tax exempt, *see supra* note 2, Congress intended to confer a tax benefit that should be reflected in the calculation of the award, *see, e.g., Louissaint* v. *Hudson Waterways Corp.,* 111 Misc.2d at 128-29, 443 N.Y.S.2d at 682.

The last of these rationales should carry no weight any longer in any court, to the extent that it relies on an interpretation of federal tax law rejected by *Liepelt,* 444 U.S. at 495 n. 10, 100. S.Ct. at 758 n. 10. Nevertheless, the remaining considerations may be so closely linked with the state's view of the measure of damages (which

is inseparable from the substantive right of action, *see Chesapeake & Ohio Railway* v. *Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916)) that it binds a federal court sitting in diversity. Several courts have either held or assumed that state law governs admissibility in this situation. *See Vasina* v. *Grumman Corp.*, 644 F.2d 112, 118 (2d Cir. 1981); *Fenasci* v. *Travelers Insurance Co.*, 642 F.2d 986, 989 (5th Cir.), *cert. denied*, 454 U.S. 1123, 102 S.Ct. 971, 71 L.Ed.2d 110 (1981); *Estate of Spinosa* v. *International Harvester Co.*, 621 F.2d 1154, 1158-59 (1st Cir. 1980); *Huddell* v. *Levin*, 537 F.2d 726, 742 (3d Cir. 1976); *Turcotte* v. *Ford Motor Co.*, 494 F.2d 173, 185 (1st Cir. 1974). *But see Croce* v. *Bromley Corp.*, 623 F.2d 1084, 1094 (5th Cir. 1980), *cert. denied*, 450 U.S. 981, 101 S.Ct. 1516, 67 L.Ed.2d 816 (1981) (holding that Fed.R.Evid. 403 controls). In addition, many courts have found similar state admissibility rules applicable in diversity cases. *See Budge* v. *Post*, 643 F.2d 372, 375 (5th Cir. 1981) (reduction of award to present value); *Murphy* v. *Georgia-Pacific Corp.*, 628 F.2d 862, 869 (5th Cir. 1980) (evidence and jury instruction on inflation); *Bailey* v. *Southern Pacific Transportation Co.*, 613 F.2d 1385, 1388 (5th Cir.), *cert. denied*, 449 U.S. 836, 101 S.Ct. 109, 66 L.Ed.2d 42 (1980) (evidence of remarriage in mitigation of damages); *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837, 838-39 (5th Cir. 1976) (same); *Johnson* v. *Serra*, 521 F.2d 1289, 1294 (8th Cir. 1975) (inflation); *Weakley* v. *Fischbach & Moore, Inc.*, 515 F.2d 1260, 1267 (5th Cir. 1975) (inflation); *Mahoney* v. *Roper-Wright Manufacturing Co.*, 490 F.2d 229, 232 (7th Cir. 1973) (evidence of alternative design feasibility in products liability case); *Chicago, Rock Island & Peoria Railway* v. *Howell*, 401 F.2d 752, 754 (10th Cir. 1968) (competency of circumstantial evidence); *E.L. Cheeney Co.* v. *Gates*, 346 F.2d 197, 206 (5th Cir. 1965) (admissibility of driving convictions to show incompetence).

Perhaps the most appealing argument that admissibility rules are tied to the substantive law is the

analogy to *Liepelt* itself, which required state courts to apply a federal admissibility rule when adjudicating a federal claim. 444 U.S. at 493, 100 S.Ct. at 757. This argument assumes, however, that *Erie* considerations work in reverse, and that assumption may be unwarranted. *Liepelt* expressly relied on the overwhelming federal interest in uniformity of practice under FELA, and the supremacy clause gives the federal government power to impose even a procedural rule on state courts in these circumstances. *See id.* at 493 n. 5, 100 S.Ct. at 757 n. 5, citing *Brady* v. *Southern Railway,* 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943) ("Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring [FELA's] authority in state courts. Only by a unfiorm federal rule . . . may litigants under the federal act receive similar treatment in all states."). *See also* Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?,* 17 Ohio St.L.J. 384, 390 4-4-15 (1956) (cited with approval in *Liepelt,* 444 U.S. at 493 n. 5, 100 S.Ct. at 757 n. 5); *Liepelt,* 444 U.S. at 503-04, 100 S.Ct. at 762 (Blackmun, J., dissenting) (noting that federal regulation of state procedure is warranted when a federal interest is implicated). If *Liepelt* required the admissibility of tax evidence because of the need for uniform procedure, rather than as a substantive FELA requirement, it sheds little light on whether state admissibility rules should be characterized as "procedural" or "substantive" for *Erie* purposes.

Moreover, despite the weight of authority and analogy there are good reasons to characterize the majority admissibility rule as procedural and therefore not binding on the federal courts under *Erie.* In adopting the rule that rejects evidence as being too confusing, a state court may merely be making a statement about its own competence and that of its juries to deal with this kind of evidence. But a federal court may assess its own competence and that of its juries to deal with

be bound by the state court's self-evaluation. *Cf. Monarch Insurance Co.* v. *Spach,* 281 F.2d 401, 407 (5th Cir. 1960). Indeed, to the extent that the exclusionary rule is based on fear of confusion, it should not apply in federal court because Fed.R.Evid. 403 provides a federal standard for rejecting relevant evidence on the grounds of risk of prejudice, confusion, or waste of time[5], and, as shown above, the Federal Rules generally displace differing state rules even when the state rule is "outcome-determinative." *Hanna* v. *Plumer,* 380 U.S. 460, 470-74, 85 S.Ct. 1136, 1143-45, 14 L.Ed.2d 8 (1965). *Liepelt* demonstrates that rule 403 would not categorically bar evidence of taxability. 444 U.S. at 494 & n. 7, 100 S.Ct. at 758 & n. 7.

Fortunately, we need not resolve this *Erie* conundrum in this case, because we hold that Illinois' substantive measure of damages is identical to the FELA measure, leaving the district court free to admit all evidence relevant to that measure under Fed.R.Evid. 402.

It is true that federal district court determinations of uncertain state law are ordinarily entitled to great weight. *See Buehler Corp.* v. *Home Insurance Co.,* 495 F.2d 1211, 1214 (7th Cir. 1974). They nevertheless remain reviewable as questions of law, *see id.,* and in the circumstances of this case less than the usual deference may be due because the district court confessed its own uncertainty when it certified this interlocutory appeal under 28 U.S.C. § 1292(b) (1976). *See In re Air Crash Disaster,* 526 F.Supp. 226, 233-34 (N.D. Ill. 1981).

The Illinois Supreme Court has never decided whether evidence of the hypothetical tax liability of lost earnings

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[5] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

is admissible in wrongful death cases. In *Hall* v. *Chicago & North Western Railway*, 5 Ill.2d 135, 149-50, 125 N.E. 2d 77, 85 (1955), a personal injury case under FELA, it noted that the trial court's exclusion of such evidence was in accordance with the majority rule. We are not persuaded by the defendants' argument that this case has no further force because it was overruled by *Liepelt* as to FELA actions; for the reasoning by which the Illinois court reached its conclusion in *Hall* may still represent the view the court would favor on questions of Illinois law. But we find the statement in *Hall* less than compelling for three other reasons.

First, *Hall* was a personal injury case in which the propriety of a statement to the jury on the nontaxability of the award was in issue, and the court's apparent approval of the majority rule on the exclusion of evidence was colored by that posture. The court interpreted federal law to grant a tax benefit to the recipient of the award by making it nontaxable, and feared that this benefit would be negated if the amount of the award were calculated on the basis of lost after-tax income, or if the jury were told that the award was tax free. *See* 5 Ill.2d at 152, 125 N.E.2d at 86 ("[I]f the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give the injured party a tax benefit would be nullified."). The conclusion that the award should be calculated on the basis of gross income was particularly inviting in the personal-injury context, because the injured person whose lost earnings were being calculated was the recipient of the award made nontaxable under federal law. The award thus directly represented the lost earnings, making the assumption that both should be tax free easy. This is not true in the wrongful death context; there, the recipient is the survivor, who is entitled, as we discuss below, to the amount the decedent would have contributed to the survivor's support—that is, the lost income net of taxes, personal consumption, and the like. This differ-

ence has caused some courts and commentators to draw a distinction between the use of tax evidence in personal-injury and wrongful-death cases. *See, e.g., Louissaint* v. *Hudson Waterways Corp.*, 111 Misc.2d at 126-27, 443 N.Y.S.2d at 680-81; Wright, *Damages for Personal Injuries: Foreword*, 19 Ohio St.L.J. 155, 157 (1958).

Moreover, the Illinois court's interpretation of federal law was wrong in any case. *Liepelt* interpreted the Internal Revenue Code not to confer an absolute benefit that changes the measure of damages due. 444 U.S. at 496, n. 10, 100 S.Ct. at 758 n. 10. *Liepelt* means, in effect, that the tax law simply makes the recipient no worse off (in terms of taxes, at any rate) than he would have been had the injury not occurred, by excusing the payment of tax on awards from which potential taxes have already been deducted. To the extent that *Hall's* approval of the exclusionary rule was premised on its mistaken interpretation of federal law, it has no force.

Finally, *Hall's* approval of the majority rule was dictum, because the only issue before the court was whether the jury could be told that the award was non-taxable. Considered dicta of a state supreme court must be given weight by a federal court in ascertaining state law, *see Gee* v. *Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980), but casual dicta are not entitled to the same degree of deference. *See McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir.), *cert. denied*, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 237 (1980); 1A J. Moore, W. Taggart, A. Vestal & J. Wicker, *Federal Practice* ¶ 0.307[2], at 3094-98 (2d ed. 1982). In *Hall* the Illinois Supreme Court seems to have approved the use of evidence of gross income because of the weight of authority from other jurisdictions (aside from its mistaken view of federal law), rather than for any strong policy reasons of its own. 5 Ill.2d at 149-50, 125 N.E.2d at 85. This approval has little precedential weight both because of its lack of articulated reasons and because the unanimity of authority on which it relied has eroded.

Even before *Liepelt*, at least seven jurisdictions permitted some consideration of tax consequences. *See Mosley* v. *United States*, 538 F.2d 555, 558-59 (4th Cir. 1976) (applying North Carolina law); *Turcotte* v. *Ford Motor Co.*, 494 F.2d 173, 184-86 (1st Cir. 1974) (applying Rhode Island law); *Runyon* v. *District of Columbia*, 463 F.2d 1319, 1322 (D.C. Cir. 1972) (applying District of Columbia law); *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659, 671-73, 136 A.2d 918, 925-26 (1957); *Adams* v. *Deur*, 173 N.W.2d 100, 105-06 (Iowa 1969); *Dempsey* v. *Thompson*, 363 Mo. 339, 344-46, 251 S.W.2d 42, 45-46 (1952) (jury instruction issue only); *Tenore* v. *Nu Car Carriers, Inc.*, 67 N.J. 466, 484-95, 341 A.2d 613, 623-29 (1975). *See also Abele* v. *Massi*, 273 A.2d 260, 260-61 (Del. 1970) (recognizing net income as the true measure, but finding use of evidence of taxability impractical). Since *Liepelt*, two state supreme courts and one lower state court have expressly adopted its reasoning. *See Blanchfield* v. *Dennis*, 292 Md. 319, 322-26, 438 A.2d 1330, 1332-34 (1982) (jury instruction issue only); *Curtis* v. *Finneran*, 83 N.J. 563, 569, 417 A.2d 15, 18 (1980); *In re Eader*, 70 Ohio Misc. 17, 18-21, 434 N.E.2d 757, 759-60 (Ohio Ct.Cl. 1982). Four state supreme courts and five lower state courts have expressly rejected *Liepelt*. *See Irwin* v. *Pacific Southwest Airlines*, 133 Cal.App.3d 709, 717-18, 184 Cal.Rptr. 228, 231-33 (1982) (jury instruction issue only) *Griffin* v. *General Motors Corp.*, 380 Mass. 362, ..., 403 N.E.2d 402, 406-08 (1980); *Tennis* v. *General Motors Corp.*, 625 S.W.2d 218, 226-28 (Mo.App. 1981) (relying on exclusivity of state pattern jury instructions); *Louissaint* v. *Hudson Waterways Corp.*, 111 Misc.2d at 126-27, 443 N.Y.S.2d at 681 (personal injury cases only); *South* v. *National Railroad Passenger Corp.*, 290 N.W.2d 819, 827-28 (N.D. 1980); (jury instruction issue only); *Dehn* v. *Prouty*, 321 N.W.2d 534, 538-39 (S.D. 1982) (jury instruction issue only); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 628 S.W.2d 171, 172-73 (Tex. App. 1982) (jury instruction issue only); *Barnette* v. *Doyle*, 622 P.2d 1349, 1365-67 (Wyo. 1981) (jury instruction

issue only). Because the authorities are now split, we cannot assume that the Illinois Supreme Court would be content to follow its dictum based on the then-unanimous state rule. Instead, we must consult all of the available data that the Illinois court would consider in reaching a decision on the issue. *See West* v. *A.T. & T.*, 311 U.S. 223, 237, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940); *Huff* v. *White Motor Corp.*, 565 F.2d 104, 106 (7th Cir. 1977).

One possible source of state law is the opinion of an intermediate state court. *See West* v. *A.T. & T.*, 311 U.S. at 237, 61 S.Ct. at 183. One pre-*Liepelt* Illinois appellate case has said that *Hall* does not control whether evidence of net income is admissible in an action under the Wrongful Death Act, but held that the admissibility issue had not been preserved for appeal. *Peluso* v. *Singer General Precision, Inc.*, 47 Ill.App.3d 842, 853-54, 8 Ill.Dec. 152, 161, 365 N.E.2d 390, 399 (1977). A concurring opinion in the same case found that the issue had been preserved, that no Illinois precedent existed, and that Illinois would follow the rule later adopted in *Liepelt*, citing much of the same evidence on which the Supreme Court was to rely. *Id.* at 856-59, 8 Ill.Dec. at 163-65, 365 N.E.2d at 401-03. Although this evidence of the Illinois Supreme Court's view would not be compelling if other data tended the other way, it confirms our view of *Hall's* lack of precedential force and indicates how an Illinois court might fill that void.

The manner in which Illinois courts have expressed the measure of damages in wrongful death cases supports the view that lost income should be reduced by the amount it would have been taxed. The Illinois Wrongful Death Act, Ill.Rev.Stat. ch. 70, ¶ 2 (1981), provides that "fair and just compensation with reference to the pecuniary injuries resulting from [the] death" is the amount due to the survivor. The Illinois Supreme Court has interpreted this statute to permit recovery only of the amount the survivor would have received from the dece-

dent but for the death. In *Elliott* v. *Willis* 92 Ill.2d 530, 540-51, 65 Ill.Dec. 852, 857-58, 442 N.E.2d 163, 168-69 (1982), it held:

> The purpose of the Wrongful Death Act is to compensate the surviving spouse and next of kin for the pecuniary losses sustained due to the decedent's death. . . . It is intended to provide the surviving spouse the benefits that would have been received from the continued life of the decedent. . . .
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> . . . .
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> . . . The test is a measurement of benefits of pecuniary value that the decedent might have been expected to contribute to the surviving spouse and children had the deceased lived.

See also Graul v. *Adrain*, 32 Ill.2d 345, 346, 205 N.E.2d 444, 445 (1965); *Welch* v. *Davis*, 410 Ill. 130, 133, 101 N.E.2d 547, 549 (1951); *Robertson* v. *White*, 11 Ill.App.2d 177, 181, 136 N.E.2d 550, 553 (1956); *McClure* v. *Lence*, 345 Ill.App. 158, 164, 102 N.E.2d 546, 550 (1952); *Paul* v. *Garman*, 310 Ill.App. 447, 463-64, 34 N.E.2d 884, 891 (1941). As *Liepelt*, 444 U.S. at 493, 100 S.Ct. at 757, and *Peluso*, 47 Ill.App.3d at 857, 8 Ill.Dec. at 164, 365 N.E.2d at 402 (Sullivan, J., concurring), have pointed out, the amount that the survivor would have expected to receive could not include the amount that would have been paid in taxes. *See also Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893, 896 (7th Cir. 1967).

We do not hesitate to conclude that Illinois courts would admit tax evidence to reach this abstract measure, because they are not unfamiliar with similar economic adjustments of damage awards. It is permissible in Illinois to introduce mortality tables, *Avance* v. *Thompson*, 387 Ill. 77, 83-84, 55 N.E.2d 57, 60, *cert. denied*, 323 U.S. 753, 65 S.Ct. 82, 89 L.Ed. 603 (1944) (action under FELA, but prior to the distinction between state and federal rules for FELA cases); *American National Bank & Trust Co.* v. *Bourland*, 65 Ill.App.3d

977, 980, 22 Ill.Dec. 625, 627, 382 N.E.2d 1380, 1382 (1978), and to introduce evidence to enable the jury to reduce awards for future losses to present value, *see Allendorf* v. *Elgin, Joliet & Eastern Railway,* 8 Ill.2d 164, 178, 133 N.E.2d 288, 296 (FELA action) *cert. denied,* 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956); *see also* Illinois Supreme Court Committee on Jury Instructions, *Illinois Pattern Jury Instructions: Civil* § 34-03 (1971); to deduct from the lost gross earnings the decedent's lost personal expenditures, *see Scully* v. *Otis Elevator Co.,* 2 Ill.App.3d 185, 200, 275 N.E.2d 905, 915 (1971) (Structural Work Act case), and perhaps to correct the portion of the award allocable to future losses for the effects of inflation, *see Raines* v. *New York Central Railroad,* 51 Ill.2d at 435-37, 283 N.E.2d at 234-35; *O'Brien* v. *Chicago & North Western Railway,* 329 Ill.App. 382, 402, 68 N.E.2d 638, 648 (1946). Moreover, there are some indications that income tax adjustments are made in practice in Illinois courts. *See Baird* v. *Chicago, Burlington & Quincy Railroad,* 63 Ill.2d 463, 468, 349 N.E.2d 413, 415 (1976); *Allendorf* v. *Elgin, Joliet & Eastern Railway,* 8 Ill.2d at 181, 133 N.E.2d at 296. Because this is the kind of evidence that Illinois courts would, or in fact do, entertain in measuring damages, we may predict that this is the course the Illinois Supreme Court would endorse were the issue presented to it. Indeed, because Illinois so scrupulously adjusts its damage awards to make them compensatory, *see* Illinois Supreme Court Committee on Jury Instructions, *Illinois Pattern Jury Instructions: Civil* § 31.04 (1971),[6] failure to adjust the

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[6] The pattern jury instructions recommend that in a case of wrongful death of an adult leaving lineal survivors the jury be instructed that:

> [i]n determining pecuniary loss . . . you may consider what benefits of pecuniary value, including money, goods, and services the decedent might reasonably have been expected to contribute to the [survivor] had the decedent lived, bearing in mind the following factors concerning the decedent:

award for taxes might render is partially punitive, and it is the law of Illinois as well as the law of this case that punitive damages are unavailable in wrongful death cases. *See In re Air Crash Disaster,* 644 F.2d 594, 605 (7th Cir. 1981).

Our conclusion is not altered by the fact that in *Elliott* v. *Willis,* 92 Ill.2d at 541, 65 Ill.Dec. at 858, 442 N.E.2d at 169, the Illinois Supreme Court refused to permit adjustment of a wrongful death award to reflect the lost investment earnings of estate funds used to pay premature estate taxes, even though that money would have been available to benefit the survivors but for the wrongful death. Although the court's reasoning is not clear, the juxtaposition of its formulation of the abstract measure of damages, quoted above, and its decision not to allow the adjustment suggests that it considered the adjustment too inconsequential to bother with, perhaps because of the uncertainty of the calculations on which the adjustment would depend. Even *Liepelt* recognized that some adjustments could be refused if their bases became too attenuated. *See* 444 U.S. at 494 n. 7, 100 S.Ct. at 758 n. 7. The standard for such a refusal is supplied by Fed.R.Evid. 403, *see id.,* which, as we have shown above, would displace any similar state rule in federal court. We conclude that *Elliott's* holding should not bind the district court in this case.

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* (Continued)

1. What he customarily contributed in the past;
2. What he earned or what he was likely to have earned in the future;
3. What he spent for customary personal expenses [and other deductions];
4. What instruction, moral training, and superintendence of education he might reasonably have been expected to give his [child] [children] had he lived;
5. His age;
6. His health;
7. His habits of industry, sobriety, and thrift;
8. His occupation.

II. Jury Instruction on Nontaxability of Award

It is clear that under current Illinois practice it is proper to refuse to instruct a jury that a damage award in a wrongful death case (by whatever means it is computed) will not be subject to taxation. In *Hall* v. *Chicago & North Western Railway*, 5 Ill.2d at 148-53, 125 N.E.2d at 84-86, the Illinois Supreme Court held that a new trial was proper in a personal-injury case under FELA because of the defense counsel's remarks in closing argument that any award would be nontaxable. It reasoned that, even if the argument correctly stated the law, it was improper because the jury was instructed on the proper measure of damages and should be presumed to follow instructions; because the possible profusion of similar cautionary instructions would be undesirable; and because, if an instruction on nontaxability were given, the jury might deprive the recipient of a tax benefit intended by Congress, by decreasing the award. *Id.* at 150-52, 125 N.E.2d at 86. In a subsequent FELA personal-injury case the Illinois Supreme Court reaffirmed its approach in *Hall*, quoting the third rationale. *Raines* v. *New York Central Railroad*, 51 Ill.2d at 430, 283 N.E.2d at 232. Although *Hall* and *Raines* were FELA cases, it is likely that their reasoning would survive their specific reversal by *Liepelt*, because the court decided them on the basis of general Illinois jurisprudence rather than on principles peculiar to FELA cases. Several post-*Liepelt* Illinois appellate decisions confirm the vitality of *Hall* and *Raines* in actions based on state law. *Edwards* v. *Kelsey-Hayes Co.*, ... Ill.App.3d ....., 68 Ill.Dec. 581, 446 N.E.2d 315 (Ill.App. 1982); *Johnson* v. *Hoover Water Well Service, Inc.*, 108 Ill.App.3d 994, 1009, 64 Ill.Dec. 476, 486-87, 439 N.E.2d 1284, 1294-95 (1982); *Christou* v. *Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill.App.3d 257, 262, 60 Ill.Dec. 21, 26, 432 N.E.2d 920, 925 (1982); *Newlin* v. *Foresman*, 103 Ill.App.3d 1038, 1046-47, 59 Ill.Dec. 735, 741-42, 432 N.E.2d 319, 325-26 (1982) (wrongful death action). These

cases are powerful evidence of the content of Illinois law. *See West* v. *A.T. & T.*, 311 U.S. at 237, 61 S.Ct. at 183.

Ordinarily in diversity cases state law determines the content of jury instructions and federal law governs only the manner in which instructions are requested and given. *See* 5A J. Moore & J. Lucas, *Federal Practice* ¶ 51.02-1 (2d ed. 1982); Fed.R.Civ.P. 51. This rule is rooted in *Erie* principles insofar as the jury instruction expounds substantive state law. That rationale may be lacking in the present case, however, because Illinois law refuses the instruction altogether rather than defining its content, and in any case the substantive law to which the instruction, if given, relates is the Internal Revenue Code. Unless Illinois has a substantive interest in refusing the instruction, therefore, perhaps federal law should control.

At first glance, Illinois does appear to have such a substantive interest. In *Hall* the Illinois Supreme Court did not merely endorse the refusal to inform the jury of the nontaxability of an award; it ordered a new trial because it considered the possibility that the jury acted on the information, even if the information was truthful, a positive evil. 5 Ill.2d at 151-53, 125 N.E.2d at 86. It therefore seems that the court regarded the possibility of a windfall, beyond the stated measure of damages, as part of the substantive right.

On closer inspection, however, it appears that the basis for the possible windfall was federal tax law, as interpreted by the Illinois court: *Hall* feared that the instruction might undo a tax benefit intended by Congress, by impelling the jury to reduce the award by the amount of the tax exemption. 5 Ill.2d at 152, 125 N.E.2d at 86, quoted in *Raines*, 51 Ill.2d at 430, 283 N.E. 2d at 232. But this reasoning, as we have already noted twice, is based on a misapprehension of federal law. *Liepelt* interprets federal law to create no positive tax

benefit. 444 U.S. at 496 n. 10, 100 S.Ct. at 758 n. 10. Because plaintiffs are not entitled under state or federal law to receive a bonus beyond compensatory damages, so informing the jury is harmless at most.[7]

Hall's other two rationales for refusing to instruct the jury on this issue—that it is unnecessary if the measure of damages is made clear, and that it would invite a flood of cautionary instructions—should not bind a federal court because they speak to matters of court administration, about which the federal courts have independent competence. Some state procedures, of course, are so "outcome-determinative" as to be inseparable from the substantive law, and must be applied in diversity cases by federal courts. *See Byrd* v. *Blue Ridge Electric Cooperative, Inc.*, 356 U.S. 525, 535-36, 78 S.Ct. 893, 899-900, 2 L.Ed.2d 953 (1958). We would be faced with an ironic quandary if we were compelled to apply the outcome-determinativeness test in this case: if we adopt the state's assumption that juries will follow instructions on the measure of damages, *Hall*, 5 Ill.2d at 150-51, 125 N.E.2d at 85-86, giving the tax instruction will be superfluous and not outcome-determinative; but if we adopt *Liepelt's* assumption that juries are likely to inflate awards absent the tax instruction, 444 U.S. at 497, 100 S.Ct. at 759, not giving the instruction will affect the outcome. State rules thus point to applica-

[7] Our conclusion would be different if Illinois interpreted its own substantive law to include a right to such a possible bonus. It is only because the result in *Hall* seems to depend on its view of the requirements of federal law (a characterization reinforced by the Illinois Supreme Court's abstract formulation of the measure of damages in wrongful death cases) that we find it not controlling. *Cf. Delaware* v. *Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1395, 59 L.Ed.2d 660 (1979) (when state ground for decision is dependent on federal law, a federal question is presented); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2853, 53 L.Ed.2d 965 (1977) (same).

tion of federal law, and federal rules to state law. But the outcome-determinativeness test is inappropriate here, because we have already determined that increasing awards beyond compensation would be an improper outcome under state law. The district court therefore is free to give the tax instruction despite contrary state procedure.[8]

We conclude that Illinois's substantive measure of damages is the same as the measure under FELA examined in *Liepelt*, and that the district court may admit all evidence relevant to that measure, subject to the considerations of Fed.R.Evid. 403.[9] We also conclude that, although Illinois courts very likely would not instruct the jury that any damages it awarded would be nontaxable, the Illinois practice does not bind the federal courts under *Erie* because, so far as we can determine from the cases, Illinois's concerns are either procedural or based on a mistaken view of federal law. For these reasons the judgment of the district court is reversed. The parties shall bear their own costs.

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[8] This case's posture distinguishes it from *Croce* v. *Bromley Corp.*, 623 F.2d at 1097, in which the Fifth Circuit refused to order a new trial for failure to give a tax instruction, because there was no indication that the verdict had been inflated. Here, we review the rules for a future trial, not a completed one.

[9] Such tax evidence need not be limited to the amount of tax the decedent would have paid on lost income. Because damage awards are reduced to present value with the expectation that by investment they will replace a lost future income stream, and because the interest so earned is taxable as income, *see In re Air Crash Disaster*, 526 F.Supp. at 227 n. 1, it may be necessary to consider evidence on the amount by which the damage award should be increased to account for this tax. *See Liepelt*, 444 U.S. at 495, 100 S.Ct. at 758.